

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE DANIELS,

Defendant-Appellant.

UNPUBLISHED

August 11, 2000

No. 213597

Kent Circuit Court

LC No. 97-012494 FC

Before: Zahra, P.J., and White and Hoekstra, JJ.

PER CURIAM.

A jury convicted defendant as charged of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to enhanced concurrent terms of twenty-five to fifty years. These sentences are to be served consecutively to a sentence defendant was then serving as a parolee. Defendant appeals as of right, and we affirm.

I

Defendant argues that numerous evidentiary errors deprived him of his confrontation and due process rights. We disagree. Defendant has failed to demonstrate the existence of error of sufficient magnitude to warrant reversal.

The trial court did not abuse its discretion in admitting, under MRE 803A, the grandmother's testimony regarding the victim's statement to her. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). The prosecutor's pretrial notice of intent to admit statements of the victim was sufficiently detailed to provide defendant with a fair opportunity to prepare to meet the statement. MRE 803A. Although conflicting, there was sufficient testimony to support the conclusion that the victim's disclosure was made spontaneously and in the absence of circumstances indicating manufacture. MRE 803A(2). The victim's brief delay in disclosing the events was excusable in light of defendant's promise to the then-seven-year-old child to buy her anything she wanted if she kept his actions a secret. MRE 803A(3); *People v Dunham*, 220 Mich App 268, 272; 559 NW2d 360 (1996). Finally, although the

grandmother's testimony was not identical with that of the victim, it was substantially similar on all key points and, therefore, was corroborative of the testimony of the victim. MRE 803A.

As to the grandmother's single reference to defendant's drug activity, and the prosecutor's brief comment, we conclude that the references did not affect the outcome of the trial and reversal is not required. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

There was no reversible error regarding Heikkinen's testimony. The direct examination of Heikkinen was short and did not disclose the contents of statements made. On cross examination, defense counsel elicited testimony regarding the victim's statements to the witness. When the prosecutor, on redirect, asked additional questions regarding the victim's statements to the witness, defense counsel did not object, but simply requested a cautionary instruction as to the use of the testimony for impeachment only. The court gave an instruction, and defense counsel made no further objection addressed to the witness' testimony regarding the victim's statements to her.

As to the doctor's testimony, defendant's objections were addressed to the doctor's vouching for the victim's credibility. Defendant did not object to the doctor's account of the victim's statements to him. As to the comment that the grandmother's statements to the doctor were consistent with the purpose of the examination, we find no prejudice resulted. For the most part, the doctor's testimony did not violate the dictates of *People v Meeboer (After Remand)*, 439 Mich 310; 484 NW2d 621 (1992); *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990); and *People v Peterson*, 450 Mich 349; 537 NW2d 857, amended 450 Mich 212; 548 NW2d 625 (1995). To the extent the doctor's testimony crossed the line, the transgression was marginal and the court gave a cautionary instruction.

The statements of the victim to the nurse who took a history from her that she had oral-genital contact with defendant on several occasions were properly admitted under MRE 803(4). *Meeboer (After Remand)*, *supra*; *People v Van Tassel (On Remand)*, 197 Mich App 653, 656; 496 NW2d 388 (1992). To the extent that the nurse related statements of the victim that were unnecessary for either medical treatment or diagnosis, the testimony was largely cumulative and therefore harmless. To the extent the nurse related inadmissible statements not testified to by others, we conclude that those additional statements did not determine the outcome of the trial. *Lukity, supra*.

Similarly, to the extent that the trial court abused its discretion when it admitted statements made by the victim to her mother and an investigating officer, the error was harmless because the testimony was cumulative, in large and crucial part, to the properly admitted testimony. *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996). Although defendant asserts that the victim's testimony was sketchy and the hearsay testimony filled out the picture, the victim testified regarding defendant telling her to keep the incidents a secret and that he would buy her something, her statements to others regarding defendant's clothes, and his using ketchup, and defendant's statement that "white stuff" would come out if it felt good. Thus, we reject defendant's argument that the cumulative affect of the admission of inadmissible hearsay and vouching testimony was to deny him a fair trial.

II

Defendant argues that he is entitled to resentencing on two grounds. Defendant first argues that his right to be sentenced by the same judge that presided over his trial was violated. Defendant correctly points out that as a general proposition a defendant is entitled to be sentenced by the same judge that presided over the defendant's trial, provided that that judge is reasonably available. *People v Clemons*, 407 Mich 939; 291 NW2d 927 (1979); *People v Pierce*, 158 Mich App 113, 115-116; 404 NW2d 230 (1987). Here, defendant's trial was presided over by a visiting judge. After conviction, defendant was sentenced by a judge of the Kent Circuit Court. The record is silent with regard to whether the visiting judge was reasonably available at the time of defendant's sentencing. Under these circumstances, we remand for resentencing before the trial judge, if the judge is reasonably available. *Clemons, supra*; *People v Humble*, 146 Mich App 198, 200; 379 NW2d 422 (1985). If the trial judge is not reasonably available, the sentence shall stand.

Defendant also argues that he is entitled to resentencing because the sentencing judge failed to explicitly determine on the record that the habitual offender enhancement was supported by the existence of the alleged prior convictions. We disagree. The sentencing judge's recognition on the record of defendant's status as a fourth habitual offender is sufficient to satisfy the requirements of MCL 769.13(5); MSA 28.1085(5), particularly where the presentence investigation report contained information supporting the enhancement. *People v Green*, 228 Mich App 684, 700; 580 NW2d 444 (1998).

Defendant's conviction is affirmed, and the matter is remanded for resentencing by the trial judge if reasonably available.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Joel P. Hoekstra